Supreme Court, U.S.
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No. 08-594

IN THE

Supreme Court of the United States

RICHARD PREIS and VICTORIA HEARIN PREIS,
Petitioners,

v.

LEXINGTON INSURANCE COMPANY, T&B, LTD. d/b/a THAMES, BATRE, MATTEI, BEVILLE & ISON, and ALLEN LADD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the district court erred by not properly instructing the jury that the insurer who issued an "all risk" insurance policy has the burden of proof to prove that water damaged the walls of the Petitioners' house during Hurricane Katrina, and absent the insurer meeting this burden with specific evidence, the insured is to prevail on the coverage claim?

II. Whether a federal flood insurance settlement agreement arising from the same hurricane occurrence can be introduced as evidence by Lexington Insurance Company, the wind damage insurer, to prove that water caused the damage to the property based upon the restrictions of Fed. R. Evid. Rule 408?

III. Whether an insurance adjuster, who has no personal knowledge of the cause of the damages to a house from a hurricane and who has not been qualified as an expert under *Daubert*, can testify at trial as to the cause of the damage to Petitioners' house? *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993); Fed. R. Evid. 701 and 702.

PARTIES TO THE PROCEEDING

Petitioners, Richard Preis and Victoria Hearin Preis, were plaintiffs at the district court and appellants at the appellate court.

Respondents, Lexington Insurance Company, T&B, Ltd. d/b/a Thames Batre Mattei Beville & Ison, and Allen Ladd, were defendants at the district court and appellees at the appellate court. Lexington Insurance Company is the insurance company. T&B, Ltd. d/b/a Thames Batre Mattei Beville & Ison is the insurance agency. Allen Ladd is Preis' insurance agent. This Petition for Writ of Certiorari only relates to claims against Lexington Insurance Company.

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RICHARD PREIS and VICTORIA HEARIN PREIS,
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LEXINGTON INSURANCE COMPANY, T&B, LTD. d/b/a THAMES, BATRE, MATTEI, BEVILLE & ISON, and ALLEN LADD,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is an unpublished opinion reported as *Preis et al. v. Lexington Insurance Company et al.*, on June 3, 2008 at 2008 WL 2247140 (11th Cir. 2008) and is reprinted in the Appendix at App. C, page 6a.[1] The opinion of the United States District Court for the Southern District of Alabama, Southern Division, granting in part and denying in part Lexington Insurance Company's motion for

[1] Petitioners' Appendix is cited herein as "App.".

partial summary judgment and denying Preis' motion for summary judgment, is a published decision reported at 508 F.Supp.2d 1061 (U.S.D.C. Al. 2007) and is reprinted at App. O, page 176a.

JURISDICTION

The Court of Appeals for the Eleventh Circuit issued its opinion on June 3, 2008. App. C, page 6a. Petitioners sought rehearing and rehearing *en banc*. The Court denied rehearing and rehearing *en banc* on August 4, 2008. App. D, page 16a. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Fed. R. Evid. 408 provides:

> Rule 408. Compromise and Offers to Compromise
>
> (a) Prohibited uses.—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
>
> (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses.—This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408 is reprinted at App. F, page 19a.

Fed. R. Evid. 701 provides:

Rule 701 Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701 is reprinted at App. G, page 20a.

Fed. R. Evid. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702 is reprinted at App. H, page 21a.

This case also involves Fed. R. Civ. P. 51 and the implementation of proper jury instructions by a district court. Fed. R. Civ. P. 51 is reprinted at App. I, page 22a.

STATEMENT OF THE CASE

On August 29, 2005, the home of Richard and Victoria Preis ("Petitioners") located on Mobile Bay at Point Clear, Alabama was completely destroyed by Hurricane Katrina. On March 8, 2006, Petitioners filed a Complaint for Declaratory Judgment, Damages, and Penalties against Defendants, Lexington Insurance Company ("Lexington"), T & B, Ltd. d/b/a Thames, Batré, Mattei, Beville, and Ison ("Thames Batre"), and Allen Ladd ("Ladd"). A jury trial was held on August 13-15, 2007. App. A, page 1a; App. P-R, pages 206a-322a. Two structural walls of the house were damaged during the hurricane requiring the house to be completely demolished. Despite the extensive damage to the house resulting in a replacement cost of $1,200,000, the jury awarded Petitioners $70,000. App. B, page 5a. The determination of the amount of the jury award was based upon whether wind or water caused the damage to the structural walls of the house. Prior to trial, all parties had agreed that the damages caused by water were not covered under the Lexington policy. Lexington argued and convinced the jury Petitioners had not met their burden of proof in establishing that the walls to the house were damaged by wind based upon the erroneous jury instruction of the district court. In fact, the district court should have instructed the jury that Lexington has the burden of proof by the preponderance of the evidence to established that water caused the damage to the walls of the house, which is excluded from the policy.

No event has resulted in more catastrophic property damage in the Gulf Coast Region than Hurricane Katrina. The clear delineation of the legal issues relating to jury trials of hurricane insurance coverage cases is of the highest national importance and priority. This is the first hurricane jury trial case which could be reviewed by this Court. Because of the national impact of insuring hurricane damage and the number of disputes between insurers and insureds relating to the cause of damage to property during a hurricane, it is of critical importance this Court review this case and rule on these issues.

The Eleventh Circuit granted oral argument on May 23, 2008 because of the importance of these issues, which are the subject of this brief. On June 3, 2008, in a per curiam opinion, a three judge Panel of the Eleventh Circuit ("the Panel") rejected Petitioners' arguments and affirmed the rulings of the district court. App. C, page 6a. In this per curiam opinion, which was unpublished by the Panel, the appellate court rejected Petitioners' arguments and held that the evidentiary rulings of the district court were not in error. The per curiam opinion contained three major errors of law. Petitioners filed a petition for rehearing and rehearing *en banc* based on the three errors which are the subject of this writ. The petition for rehearing and rehearing *en banc* were denied on August 4, 2008. App. D, page 16a. The original opinion of the Eleventh Circuit was issued as mandate on August 12, 2008. App. E, page 18a.

In most hurricane cases that will be tried to a jury between a insurer and the insured, the question of whether water or wind caused the damage to the property will be the primary factual issue. In most instances, no one is present at the damaged property

and the jury must rely on expert testimony to make this determination of the cause of the damages to the property. Both experts agreed in this case on one principle—the maximum wind in hurricanes arrives prior to the maximum storm surge. This makes the determination of the cause of the damage that much more difficult because the storm surge erases the evidence of the wind damage. Because of the contested nature of the expert testimony, the outcome of the case will often turn on who has the burden of proof on the cause of the damage to the property. The court's instructions to the jury, in the context of the trial of a hurricane case, is of critical importance. It is for this reason this writ should be granted to set rules and guidelines for the court's administration of jury trials involving the insurer and insured in hurricane cases.

Three legal issues relating to the "cause" of the damage to the house from Katrina arose during the trial. The first issue relates the burden of proof on the cause of the loss to the property when the insurer has issued an "all risk" policy. The court mistakenly instructed the jury that the plaintiff homeowner had the burden of proof to prove "***that their claim is within its coverage, and the amount of their covered damage.***"[2] This is clearly contrary to the long established line of cases in all circuits, including the Eleventh Circuit, which holds the insurer has the burden of proof to prove that the force of the water damaged the two structural walls in the house resulting it its demolition. All of the federal courts including the Second, Fifth, and Tenth Circuit have properly defined the burden of proof an "all risk"

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[2] App. R, p. 322a, ll. 21-25. (Emphasis added.)

policy in non-hurricane cases. *Dow Chemical Co. v. Royal Indem. Co.* 635 F.2d 379, 386 (5th Cir. 1981); *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 453 F.3d 1281 (10th Cir. 2006); *International Multifoods Corp. v. Commercial Union Ins. Co*, 309 F.3d 76, 84 (2nd Cir. 2002); *North American Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc.*, 499 F.Supp.2d 361, 374 (S.D.N.Y. 2007). While the Eleventh Circuit has adopted the same rules as the other circuits on "all risk" policies, it improperly instructed the jury on the application of the burden of proof involving exclusions under "all risk" policies on the loss in hurricane cases. *National Union Fire Ins. Co. of Pa. v. Carib Aviation, Inc.*, 759 F.2d 873, 875 (11th Cir.1985). The ruling in this case that the insured has the burden of proof on the cause of damages to the property when the insurer has issued an all risk policy represents a significant departure from the rules followed in all circuits in the United States in non-hurricane cases.

During oral arguments before the Panel, the Panel refused to accept the legal proposition that Petitioners were only required to prove the house walls were destroyed during the hurricane and that it was the insurer's burden, by a preponderance of evidence, to show the walls were destroyed by water.[3] Petitioners met their burden of proof by showing the walls were destroyed and it was the insurer's burden to show the cause of the damage to the walls. That is the essence of an "all risk" insurance policy.

A clear delineation of these issues is required for purposes of future jury trials on hurricane cases.

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[3] If this was a "perils" policy, Petitioners would be required to prove the walls were destroyed by a covered peril—the wind.

Because all parties acknowledge that the policy in question in this case is an "all risk" policy, the Supreme Court should address the different burdens of proof in an "all risk" policy and the "perils" policy and address the level of the burden of proof of the insurer.[4] This Court should provide comprehensive instructions on the burden of proof a district court should give to a jury when no witnesses are present when an "all risk" policy has insured the loss.

The second issue relates to the error committed at trial by allowing the wind insurer to introduce the federal flood insurance .settlement agreement in violation of Fed. R. Evid. 408 for the sole purpose of proving the water rather than the wind caused the damage to the property. Petitioners settled with the flood insurer prior to the trial with Lexington. Over the objection of Petitioners, the court allowed the federal flood insurer settlement agreement into evidence despite the specific prohibitions under Rule 408 and the numerous cases not allowing its introduction. This was clearly prejudicial to Petitioners and became Lexington's primary defense theme.

The third issue relates to the district court allowing insurance adjusters to testify as to the cause of the damage when they had no first hand knowledge of the cause of the damage and had not be qualified as experts pursuant to Rules 701 and 702 of the Federal Rules of Evidence. The court disregarded the gatekeeper requirements of *Daubert* in allowing this type of opinion testimony to be presented to the jury.

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[4] Lexington argued before the district court and the appellate court the burden of proof as to what caused the loss to the property for a perils policy and all risk policy were in fact the same.

Insurers are denying coverage in hurricane cases based upon the failure of any court to fully and comprehensively address the high burden of proof of the insurer arising from "all risk" policies. Most circuits have conclusively resolved these high burdens of proof on "all risk" policies in non-hurricane cases. The Supreme Court should take this opportunity to set forth specific jury instructions and rules of evidence, which fully and in detail set forth the interplay in the burden of proof of "all risk" policies, use of insurance adjusters as expert witnesses, and the prohibitions on the introduction of federal flood insurance settlement agreements to prove the cause of damages to the property. These issues are recurring in all hurricane cases. No case currently exists addressing the interplay of these important "causation" issues and unless the United States Supreme Court accepts this case for review, none will exist in the immediate future. Because of the lack of authority by the courts and the need for uniformity of the courts in the Gulf Coast and Atlantic Coast areas in addressing the issue of property damage from hurricanes, insurers like Lexington will continue to control the relationship between the insurer and insured based solely upon this uncertainty.

A clear delineation of the insurer's burden of proof relating to the cause of the damage will balance the scales of justice in these type of cases, and remove the issue of who has the most economic resources to litigate the case as the primary factor that tips those scales in favor of the insurer. Without a clear delineation of the interplay of these important issues, the hurricane cases will evolve into a matter of who has the most money to hire experts, and the insurer will win in most instances because of the uncertainty of the law on causation and the lack of resources of

the insured to pursue the claim. The scales of justice should be balanced by the Court fully and completely addressing the issues of the burden of proof in an "all risk" policy, and the application of Fed. R. Evid. 408, 701, and 702 in limiting the introduction of the flood insurance settlement agreement and the testimony of non-expert witnesses on the cause of the loss. This case is of the highest public importance and national interest based upon the significant impact Hurricane Katrina had on private property and in the insurance industry and the issues that will arise with future hurricanes.

REASONS FOR GRANTING THE PETITION

I. Petitioners seek review of the Eleventh Circuit's ruling that the insured, rather than the insurer, has the burden of proof on the amount of damage caused by water during a hurricane because it is in conflict with the ruling of the Fifth Circuit, Tenth Circuit, Second Circuit and other courts as to who has the burden of proof on a exclusion under an "all risk" policy

The law is clear that an "all risks" insured need prove only the loss or damage to the insured property, with the burden then shifting to the insurer to prove the loss arose from a cause excluded under the policy. *Dow Chemical Co. v. Royal Indem. Co.* 635 F.2d 379, 386 (5th Cir. 1981); *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 453 F.3d 1281 (10th Cir. 2006); *International Multifoods Corp. v. Commercial Union Ins. Co*, 309 F.3d 76, 84 (2nd Cir. 2002); *North American Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc.*, 499 F.Supp.2d 361, 374 (S.D.N.Y.

2007). There is not legal justification for a different standard to be applied to damage by a hurricane. Based upon these cases, the law requires the all risk insurer in a hurricane case to prove the exclusion--water damage to the property.

In the pretrial proceedings, the district court determined the Lexington policy was an all risk policy and accurately set forth the burden of proof of the insurer.[5] However, in the jury instruction, the

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[5] The district court ruled in its decision on the various motions for summary judgment in this matter as follows:

> The parties agree that the Policy covers loss from wind. Lexington contends that the amount of wind damage was limited to the $64,167.86 it tendered the plaintiffs. The plaintiffs contend that wind, rather than flood, caused two walls of the house to collapse, which in turn required the structure's demolition, such that the damage attributable to wind is much greater than Lexington concedes.
>
> "The insurer bears the burden of proving the applicability of an exclusionary clause within a policy." *Blackburn v. National Union Fire Insurance Co.*, 784 So.2d 637, 641 (La. 2001). Thus, on motion for summary judgment Lexington bears the initial burden of showing affirmatively that no reasonable jury could find less flood damage, and more wind damage, than Lexington contends.

App. O, page 196a.

Further, in its ruling on the Petitioners' motion in limine, the court stated as follows:

> After rulings on motions for summary judgment and a voluntary dismissal by the plaintiffs, this case boils down to one for insurance benefits. The question is whether and to what extent the insured property suffered wind damage (covered) or water/flood damage (excluded). As insisted by the plaintiffs and held by the court in an earlier ruling, the insurer bears the burden of showing the applicability of a policy exclusion.

App. N, page 169a.

district court completely viscerated the distinction between a "perils" policy and an "all risk" policy.[6] The issue of whether this is an all risk policy is not contested. The opinion of the Panel acknowledges the following jury instruction was given to the jury:

> ". . .that the initial burden is on the plaintiffs to proof 'the existence of the policy sued on, it terms and provisions, **that their claim is within its coverage, and the amount of their covered damage**.'"

App. C, page 14a. (Emphasis added). This clearly is not a proper statement of the law on an all risk policy, and the insured clearly does not have the burden to prove the amount of his covered damage as specifically stated in the jury instruction. Because of the unique nature of hurricane cases when no one is present to see the cause of the loss, the jury's complete understanding of who has to prove the cause of the loss is a key element in affording all parties their day in court. The court fell woefully short of explaining the burden of proof properly in this case.

An all risk policy initially covers any property damage by its express terms. The insured is only required to prove that his property has been damaged–in this case that the walls of his house have fallen down. The only damage that is not covered is property damage caused by an exclusion, i.e., water. An all risk policy, by its name and terms, insures the insured against any loss caused by any reason except losses that are excluded from the policy. In this case,

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[6] See *Alex R. Thomas & Co. v. Pacific Indem. Co.*, 2002 WL 737478, 4 (Cal. App. 1 Dist. 2002) for a full discussion of differences between an all risk and perils policy.

the insurer would have the burden of proving water caused damage to the walls of the property after Petitioners met their initial burden of showing the walls had fallen down during the hurricane. On the other hand, a perils policy lists each peril that is covered, and if the peril is not listed, then no coverage exists. If a perils policy had existed, Petitioners would have had the burden of proof on what caused the damage to the walls and would have been required to prove that wind, which is a covered peril, caused the walls to fall down. Since the policy issued by Lexington was an "all risk" policy, the insurer had the burden to prove the exclusion—that water caused the walls to fall down. The distinction between a perils policy and an all risk policy is very important in hurricanes when no persons are present to see first hand what caused the damage to the house.[7]

The district court allowed Lexington to argue Petitioners had the burden of proof on the wind causation issue based upon the previous ruling of the court at the commencement of the proceeding on August 14, 2007. App. P, pg. 264a-268a; App. Q, pg. 270a-272a. The court used the same burden of proof in instructing the jury as to the burden of proof. App. R, pg. 321a-322a. Further, it allowed Lexington to argue the improper standard of burden of proof to the jury.[8] App. R, pg. 320a-321a. Because of this confusion, the argument of Lexington's counsel, and the fact the

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[7] In fact, counsel for Lexington argued at the oral argument before the Eleventh Circuit the burden of proof for an all risk policy and a perils policy was one in the same, which was apparently accepted.

[8] App. Q, pg. 314a, ll. 19-23; App. Q, pg. 312a, l.5-pg. 314a, l. 9; App. R, pg. 318a, ll. 15; App. R, pg. 318a-319a, ll. 1-10; App. R, pg. 322a, ll. 21-25.

court allowed Lexington to argue to the jury an improper burden of proof, the jury improperly completed the jury interrogatory form and did not answer the amount of water damage or the total loss. App. A, pages 3-4a. A writ should be granted so that this Court may see the errors committed in this proceeding and have the opportunity to set forth instructions that courts should give in hurricane cases when all risk policies are implicated.

In *National Union Fire Ins. Co. of Pa. v. Carib Aviation, Inc.*, 759 F.2d 873, 875 (11th Cir.1985), the Eleventh Circuit explained that "in order to recover under an all risk policy, an insured must prove only the loss or damage to the insured's property while the policy was in force, with the burden then shifting to the insurer to prove that the loss arose from a cause that is excluded under the policy." See also *Jewelers Mutual Insurance Co. v. Balogh*, 272 F.2d 889, 892 (5th Cir. 1959); *Morrison Grain Co., Inc. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430 (5th Cir. 1980). Despite the specific holding in *Nat'l Union Fire Ins. Co. of Pa. v. Carib Aviation, Inc.*, the court adopted its own rule.

The case law in Eleventh Circuit and the predecessor Fifth Circuit is clear that the insurance company has to prove the cause of the loss when an all risk policy exists. In the case of hurricane cases, when no witnesses are present, the insurer must affirmatively prove that the water caused the loss. The court clearly did not explain to the jury that the insurer had the obligation to prove that the cause of the damage to the walls was water. All courts have concluded the Lexington policy was an "all risk policy". Lexington had the burden to prove the loss

was caused by an "excluded peril"-water.[9] The district court failed to recognize the different burdens of proof required of an insurer for an "all risks" policy and a "perils" policy.[10]

The Court is free to apply the traditional federal common law technique of decision by drawing upon standard insurance principles. In addition, because insurance policies are contracts, basic contract rules govern the interpretation of a policy's terms. *Eagle-Picher Industries v. Liberty Mutual Insurance Co.*, 682 F.2d 12 (1st Cir.1982) ("[i]nsurance policies are generally interpreted in the same way as other contracts"), *cert. denied,* 460 U.S. 1028, 103 S.Ct. 1279, 75 L.Ed.2d 500 (1983); *Atlas Pallet, Inc. v. Gallagher,* 725 F.2d 131, 135 (1st Cir. 1984); *Tucard, LLC v. Fidelity Nat. Property & Cas. Ins. Co.*, 567 F.Supp.2d 215, 221 (D.Mass. 2008).

The Court should grant a writ on these issues because the Court has ample authority to control the administration of justice in the federal court system to insure the implementation of proper jury instructions under Rule 51 of the Federal Rules of Civil Procedure that are clear and reflective of the law. *Danforth v. Minnesota,* - - - U.S. - - - -, 128 S.Ct. 1029, 1046-1047, 169 L.Ed.2d 859 (2008); *Johnson v.*

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[9] ". . .an "all risks" insured need prove only the loss or damage to the insured property, with the burden then shifting to the insurer to prove that the loss arose from a cause that is excluded under the policy". *Dow Chemical Co. v. Royal Indem. Co.*, 635 F.2d 379, 386 (5th Cir. 1981).

[10] See App. Q, pg. 306a, ll. 25-pg. 307a, ll.2, 13-17 relating to dismissal of contents; App. Q, pg. 312a, ll. 5-pg. 314a, ll. 9 relating to charge conference on burden of proof; App. R-pg. 318a, ll. 15 relating to discussion of change of burden of proof; App. R- pg. 318a, ll. 1-10; App. R-pg. 322a, ll. 21-25 for jury instruction.

Fankell, 520 U.S. 911, 117 S.Ct. 1800, 138 L.Ed.2d 108 (1997).

II. Petitioners seek review of the Eleventh Circuit's ruling because it is in conflict with the rulings of this court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993) and circumvented Fed. R. Evid. 701 and 702 by allowing opinion testimony of insurance adjusters on the cause of damage to the petitioners' home when these individuals had not been qualified or named as experts, and it is in conflict with the ruling of other circuits as set forth herein

Tracy Clark and James Gibson are flood insurance adjusters, who testified at trial. Petitioners objected to their testimony prior to the trial in a motion in limine. App. L, page 147a. Lexington introduced their testimony as expert witnesses even though they had not been qualified under *Daubert*. App. L-pg. 148a-152a; App. M-pg. 165a. The legal issue presented for review by this Court is whether an insurance adjuster, who has no personal knowledge of the cause of the damages to a house from a hurricane and who has not been qualified as an expert under *Daubert*, can testify at trial as to the cause of the loss? *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993); Fed. R. Evid. 701 and 702.

After Lexington recognized that it had not timely designated these individuals as expert witnesses, Lexington attempted to have them testify as "lay witness" under a limited exception even though these witnesses had no personal knowledge of the cause of

the loss. The district court ruled Clark and Gibson could testify despite the fact that they were testifying as to the same conclusion as Van Fisher, who had been timely designated as an expert and subjected to *Daubert* review. App. N, pages 173a-174a. Mr. Clark and Mr. Gibson testified at trial over the objection of Petitioners.[11] What is more ironic is Clark admitted he did not have the expertise to make the determination and needed the support of engineers to support his testimony. App. Q, pg. 408, l. 5-pg. 410, l. 6.

Rule 701 and 702 and the line of cases from *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993) clearly set forth the "gate keeper" functions of the federal courts and the rules that must be followed. The adjusters of the insurers were not qualified as expert witnesses and had no first hand knowledge of what caused the loss to the house. Further, the adjusters testified on the same subject matter as Lexington's *Daubert* qualified expert and was "based on the same scientific, technical, or other specialized knowledge within the scope of Rule 702" that was used by Lexington's designated expert.

In the ruling of the Eleventh Circuit, the Panel stated the following:

> The testimony offered by Clark and Gibson specifically related to damage to the home they observed during the inspection they personally conducted, the reports they each individually prepared regarding their assessments of the

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[11] App. P, pg. 243a-266a; App. Q, pg. 274a-276a, 281a, ll. 12-15, pg. 281a, ll. 2, pg. 283a, l. 3; See also App. Q, pg. 280a, ll. 8-9; pg. 286a, ll. 17-24.

> damage to the Preis' home and the procedures they employed to reach their loss estimates.

App. C, at page 10a. The ruling acknowledges that the adjusters were giving an opinion as to the cause of the damage to the house but misinterprets the requirement of first hand knowledge of the witness.

Fed. R. Evid. 701 provides the following relating to opinion testimony by lay witnesses:

> 701. Opinion Testimony by Lay Witnesses
>
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. App. G, page 20a.

Under Rule 701, "a lay opinion must be based on personal perception, must be one that a normal person would form from those perceptions, and must be helpful to the jury." *U.S. v. Riddle*, 103 F.3d 423, 428 (5th Cir.1997); *Soden v. Freightliner Corp.*, 714 F.2d 498, 511 (5th Cir.1983). In particular, the witness must have personal knowledge of the facts underlying the opinion and the opinion must have a rational connection to those facts. *Mississippi Chemical Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 373 (5th Cir. 2002). Lexington used three experts to testify to the same issue, but only one of the experts had been designated as such and was subject to the scrutiny required by *Daubert v. Merrell Dow Phar-*

maceuticals, supra.[12] "Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse." *U.S. v. Frazier,* 387 F.3d 1244, 1263 (11th Cir. 2004).

In order for the lay person's testimony to be admissible, Lexington must show the witness has personal knowledge of facts and that the offered opinion is based upon first hand knowledge of the fact and "(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." The admission of the testimony of Tracy Clark and James Gibson fails both of these requirements. App. P, pg. 245a-264a; App. Q, pg. 272a-301a. First, the lay witness adjusters had no first had knowledge of what caused the loss, wind or water, because they were not present the day of the storm. Secondly, this testimony and review of the evidence was identical to the expert opinion of Van Fisher, who was designated as an expert witness. It is without debate Tracy Clark and James Gibson's testimony was "based on scientific, technical, or other specialized knowledge within the scope of Rule 702" because it was exactly the same testimony and subject matter of Lexington's expert, Van Fisher.

As stated in the case of *U.S. v. Williams,* 81 F.3d 1434, 1442 (7th Cir. 1996), "The difference between an expert witness and an ordinary witness is that the former is allowed to offer an opinion, while the latter

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[12] District courts have the continuing responsibility of acting as the vigilant gatekeepers of expert testimony to ensure that it is reliable. *See Kumbo Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2nd 238 (1999), 147-149, 119 S.Ct. 1167; *U.S. v. Freeman,* 488 F.3d 1217, 1227 (9th Cir. 2007).

is confined to testifying from personal knowledge. Fed.R.Evid. 701, 702; *Richardson v. Consolidated Rail Corp.*, 17 F.3d 213, 218 (7th Cir.1994); *U.S. v. Fidelity & Deposit Co.*, 986 F.2d 1110, 1117-18 and n. 8 (7th Cir.1993); *Kaczmarek v. Allied Chemical Corp.*, 836 F.2d 1055, 1060-61 (7th Cir.1987)." It is clear a person that testifies as to the "cause of the event" when he has no first had knowledge falls within the definition of an expert opinion.

Review is needed to resolve a clear conflict among the Eleventh Circuit and the other circuits and to resolve a clear conflict in ruling in this case and *Daubert v. Merrell Dow Pharmaceuticals*, *supra*. Further, the decision below is wrong and dramatically misreads statutory language of Federal Rules of Evidence 701 and 702 and this Court's precedent.

III. Petitioners seek review of the Eleventh Circuit's ruling because it is in conflict with the ruling of other circuits and Federal Rule of Evidence 408 by confirming the district court ruling that evidence of the settlement agreement with the flood insurer is admissible into evidence by the "wind insurer" to prove the cause of the loss to the house.

Petitioners had previously settled with Hartford, who had provided the federal flood insurance coverage. Lexington listed the flood settlement agreement as an exhibit that it intended to use at trial to prove the cause of the loss to the property. The amount of the flood settlement in the amount of approximately $587,659.71 was evidenced by App. K, pages 145a-146a. Petitioners filed a motion in limine objecting to the introduction of the settlement agreement into

evidence. App. L, page 147a; App.M, page 158a. The trial court ruled the amount of the flood settlement was admissible. App. N, pg. 2-4. The court's admission of the settlement agreement between Petitioners and the flood insurer was clearly prejudicial and was not in accordance with Fed. R. Evid. 408. App. N, pg. 171a-172a. The wrongfully admitted flood insurer settlement became the primary theme for Lexington's defense of the claim. App. P, pg. 207a-208a; pg. 209a, l. 15; pg. 209a, l. 3; pg. 210a; pg. 211a-214a; App. R, pg. 319a-320a, ll. 10-20. It is hard to envision an evidentiary ruling being more prejudicial.

The Panel issued a ruling that conflicts with a long line of cases in all circuits barring the introduction of insurance settlement agreements that arise out of damages from the same occurrence. There is certainly no reason for there to be a different application of law just because multiple types of policies cover damage from a hurricane.

Congress, in adopting Fed. R. Evid. 408, has statutorily determined settlement agreements are to be encouraged, and are not admissible into evidence. In hurricane cases, the ruling effectively allows the introduction into evidence of the insurer that settles first. In many instances, this will implicate the timing and amount of the payment arising from federal flood insurance. This Court clearly has a federal interest in regulating this issue.[14] There is no

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[14] This policy and *all disputes arising from the handling of any claim under the policy* are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended (42 U.S.C. §4001, *et seq.*), and federal common law. *Shuford v. Fidelity Nat. Property & Cas. Ins. Co.*, 508 F.3d 1337, 1344 (11th Cir. 2007); *Studio Frames Ltd. v. Standard Fire Ins. Co.*, 483 F.3d 239 (4th Cir. 2007).

reason for any court to carve an exception into Fed. R. Evid. 408 based upon hurricane cases. As a matter of policy, this encourages either the wind or water insurer to wait to settle because of the potential of using the other parties settlement in defending their lawsuit. This has never been the law. The Panel and district court eliminated the public policy consideration of encouraging settlement as adopted by the United States Congress.

Fed. R. Evid. 408 provides in pertinent part: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . ." Fed. R. Evid. 408. App. F, page. 19a. *Reynolds v. Roberts,* 202 F.3d 1303, 1318 (11th Cir. 2000). Admission of evidence of the settlement could work to discourage plaintiffs and defendants from settling with one or more of several co-defendants. *Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976).

The U.S. District Court Southern District of Alabama in *Armstrong v. HRB Royalty, Inc.*, 392 F.Supp.2d 1302 (S.D. Ala. 2005), explained Fed. R. Evid. 408 precluded the admission of settlement evidence by writing:

> Rule 408 excludes evidence of settlement offers only if such evidence is offered to prove liability for or invalidity [or amount] *of the claim under negotiation.*" *Vulcan Hart Corp. v. National Labor Relations Board,* 718 F.2d 269, 277 (8th

> Cir.1983)(emphasis added). The Court concludes that Rule 408 unambiguously requires that the claim as to which a settlement offer was made and the claim at issue in the litigation in which the offer is proffered as evidence must be the same claim. (footnotes omitted).

Armstrong v. HRB Royalty, Inc., supra, at 1304-1305. Unlike the facts in *Armstrong*, the issue in the settlement and the issue in the trial was clearly the same claim–the amount of water damage to the Petitioners' residence.

This was further explained by the court in *Branch v. Fidelity & Cas. Co. of New York*, 783 F.2d 1289 (5th Cir. 1986):

> Voluntary settlements are favored for they obviate the need for costly and time-consuming litigation. *Miller v. Republic National Life Ins. Co.*, 559 F.2d 426 (5th Cir.1977). In multiparty maritime litigation, settlements "should be even more encouraged." *Cates v. United States*, 451 F.2d 411, 416 (5th Cir.1971). The spectre of a subsequent use to prejudice a separate and discrete claim is a disincentive which Rule 408 seeks to prevent. The admission of the settlement agreement into evidence, and the use made of that evidence, violated both the letter and spirit of Rule 408. *See McInnis v. A.M.F., Inc.*, 765 F.2d 240 (1st Cir.1985); *McHann v. Firestone Tire & Rubber Co.*, 713 F.2d 161 (5th Cir.1983).

Branch v. Fidelity & Cas. Co. of New York, supra, at 1294.

The district court in its rulings prior to trial erred by creating a balancing of interest under Fed. R. Evid. 401 and 403. A settlement agreement will

always be relevant as to what the settling parties believed was the cause of the loss. However, that is not the proper standard for determining whether a settlement document is admissible into evidence. By the express terms of Fed. R. Evid. 408, the settlement agreement is not admissible for two reasons–its obvious prejudicial effect and the public policy behind the encouragement of settlement. Both Lexington and the court believed the flood insurance settlement agreement was not within the scope of the rule because it did not involve the settlement agreement between Lexington and Petitioners. App. N, pg. 171a-172a. That is not a proper statement of the law.

As explained by the Fifth Circuit in *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067 (5th Cir. 1986):

> No party, or the court, should disclose to the jury the amount of a settlement with other defendants in the absence of compelling circumstances demanding disclosure which are not present here. Under the circumstances of this case, the district court's announcement to the jury violated Rule 408 and prejudiced the substantial rights of Slipstreamer. It is entitled to a new trial.

Kennon v. Slipstreamer, Inc., *supra*, at 1071.

Fed. R. Evid. 408 also applies with equal force whether the settlement involves the litigants or a litigant and a third party. *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1069 (5th Cir.1986); *McHann v. Firestone Tire and Rubber Co.* 713 F.2d 161 (5th Cir. 1983); *McInnis v. A.M.F.*, Inc., 765 F.2d 240, 247 (1st Cir.1985). According to *Weinstein's Federal Evidence* § 408.04 (2d ed.2005):

> Rule 408 codifies the general practice of the federal courts in making compromise agreements

> inadmissible in such circumstances as proof of liability for, or invalidity of, the claim or its amount. . . . Even if the fact of the settlement is admissible for a purpose other than proof of liability, disclosure of the settlement amount may constitute reversible error. *Crigger v. Fahnestock and Co., Inc.* 2005 WL 857368, 1 (S.D.N.Y.) (S.D.N.Y. 2005).

As further stated in the case of *McInnis v. A.M.F., Inc.* 765 F.2d 240, 247 (1st Cir. 1985):

> In analyzing the impact of Rule 408 on the admissibility of the Poirier release, we shall initially allay any doubts that the Rule applies to cases which are posturally like the one now before us. The settlement agreement at issue here was entered into between a litigant and a third party, rather than between the two litigants themselves. The Advisory Committee Note clearly acknowledges that the policies underlying the exclusionary rule are equally applicable to such a situation. The note states that:
>
> ***While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. The latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.***

Fed. Rule of Evid. 408, advisory committee note (Emphasis added).

Further, under Fed. R. Evid. 408, evidence of offers of settlement is inadmissible, even those settlements

between a party and a non-party. Fed. R. Evid. 408; *U.S. v. Quality Built Const.*, 358 F.Supp.2d 487, 490 (E.D.N.C. 2005). As further explained by Professor Louisell:

> When a party has potential liability to more than one claimant, or when a single claimant claims relief from more than one defendant, settlement negotiations are commonly carried out on several fronts. ***An exclusionary rule which reached only the compromise negotiations between the very parties who subsequently litigate the underlying claim would fall far short of providing the needed protection to the settlement process, and would in fact leave unprotected the very situation which poses the greatest needs***. The very terms of Rule 408 leave no doubt that it reaches these cases, and that under it a defendant cannot prove the invalidity or amount of a plaintiff's claim by proof of plaintiff's settlement with a third person, nor can plaintiff show the defendant's liability or extent of liability, by proof of defendant's settlement with a third person. 2 D. Louisell & B. Mueller, Federal Evidence s 171 at 289 (1978).

Young v. Verson Allsteel Press Co., 539 F.Supp. 193, 195 (D.C. Pa.1982). (Emphasis added.)

The Panel and the district court relied on the case of *Dallis v. Aetna Life Ins. Co.*, 768 F.2d 1303, 1307 (11th Cir.1985). This case is not controlling on this important issue as a review of the facts of this case clearly indicate it is not applicable to the facts at bar. In *Dallis*, the settlement payment in question in did not arise out of the same occurrence as the case being tried and involved different health claims for different patients with defendants, who were not

involved in the pending case. The Panel simply ignores the finding in the case which allowed the introduction of the settlement only because it arose out of a different occurrence. This case clearly is not authority to overrule the numerous cases cited by Petitioners, which would absolutely bar the admissibility of a settlement payment by an insurer arising from the same occurrence.

The court's admission of the settlement agreement between Petitioners and the flood insurer was clearly prejudicial and was not in accordance with Fed. R. Evid. 408. This wrongfully admitted flood settlement became the primary theme for Lexington's defense of the claim. Review should be granted by this Court because the ruling of the Panel and the district court is in conflict with the ruling of other circuits and Fed R. Evid. 408.

CONCLUSION

The rulings on all three of the above issues represent significant departures from the rules followed in all circuits in the United States in non-hurricane cases and are in conflict with the holding of the United States Supreme Court and the Federal Rules of Evidence. While on first blush each individual issue seems rather mundane, the interplay of these causation issues as they are applied to hurricanes have significant and unique applications to the largest catastrophic property damage issues facing this country for the last century with Hurricane Katrina. In the case of all three issues that are the subject of the writ, the district court, as affirmed by the Panel, was required to create exceptions to the long established federal law and statutes in order to uphold the decision of the jury. It is respectfully submitted there is no legal justification for the

district court and the Panel to create three hurricane "exceptions" to the general rules of Rules 408, 701, 702 of the Federal Rules of Evidence and the clear case law of burden of proof on exclusions in "all risk" policies that have been established in non-hurricane litigation.

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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